IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No. 619 of 1997

For Approval and Signature:

HONOURABLE MR.JUSTICE A.L.DAVE
and
HONOURABLE MR.JUSTICE S.R.BRAHMBHATT

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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MAHENDRA @ MALIO BACHUBHAI - Appellant
Versus
STATE OF GUJARAT – Respondent

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Appearance :
MR DIPAK R DAVE for Appellant :
MR HM PRACHCHHAK ADDL PP for Respondent :

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CORAM : HONOURABLE MR.JUSTICE A.L.DAVE
and
HONOURABLE MR.JUSTICE S.R.BRAHMBHATT

Date : 05/04/2006

ORAL JUDGMENT

(Per : HONOURABLE MR.JUSTICE A.L.DAVE)

1. This appeal arises out of a judgment and order rendered by learned Additional City Sessions Judge, Court No. 27, Ahmedabad on June 11, 1997 in Sessions Case No. 209 of 1996. The appellant was tried by the Sessions Court and came to be convicted for an offence punishable under Section 302 of the Indian Penal Code and ordered to undergo rigorous imprisonment for life. The appellant also came to be convicted for an offence punishable under Section 135(1) read with Section 37(1) of the Bombay Police Act and came to be sentenced to undergo simple imprisonment for 1 year and to pay fine of Rs.200/- and in default, to undergo simple imprisonment for a period of 15 days. The sentences were ordered to run concurrently. Benefit of set off was ordered to be given to the accused/appellant.

2. The incident occurred on 11th May, 1996 at about 11-40 P.M. near the house of Gafurbhai situate at Narsinhji's Neliya in Gomtipur area of Ahmedabad. The appellant is alleged to have assaulted deceased Girish Mafaji Thakor with two guptis and committed his murder. The incident was witnessed by three witnesses namely (i) Sarojben Rajuji, (ii) Mukeshbhai Jivaji (iii) Maheshbhai Dashrathbhai. FIR was lodged by brother of the deceased Ganeshbhai Mafaji Thakor, who reached the spot

immediately after the incident, on hearing shouts. The FIR was lodged with Gomtipur Police Station. The offence was registered and investigation started. The Investigating Officer having found sufficient material against the accused/appellant, arrested him and produced him before the Magistrate and then, filed a chargesheet against him before the learned Metropolitan Magistrate. Since the offences charged against the accused/appellant were exclusively triable by the Court of Sessions, the case was committed by the learned Metropolitan Magistrate to the City Sessions Court. Charge was framed against the appellant at Ex. 1. The accused/appellant pleaded not guilty to the charge and came to be tried.

2.1 The learned City Sessions Judge, after considering the evidence led by the prosecution, came to the conclusion that the prosecution was successful in establishing the charges levelled against the appellant and recorded conviction and passed sentences as stated in the earlier part of this judgment. Aggrieved by the said judgment and order, the convict has preferred this appeal.

3.Learned Advocate Mr. Dipak R. Dave appearing for the appellant has taken us through the record and proceedings. According to Mr. Dave, the trial Court has erred in appreciating the evidence. Trial Court ought not to have placed reliance on evidence of so called eye-witnesses. In support of this contention, Mr. Dave has contended that the eye-witnesses are interested witnesses as they are friends of the deceased. He submitted that there has been a history of animosity and the trial Court ought to have given benefit of doubt to the accused considering the possibility of false implication. Mr. Dave submitted that the depositions of witnesses were parrot like and no weightage could have been given to such witnesses as they could be tutored witnesses. Mr. Dave, therefore, submitted that this appeal, may be allowed.

4.Learned Addl.P.P. Mr. H.M. Prachchhak has opposed this appeal. According to Mr. Prachchhak, the prosecution has examined Sarojben Rajuji, Mukeshbhai Jivaji and Maheshbhai Dashrathji as eye-witnesses to the incident. Sarojben is the sister of the deceased and Mukeshbhai and Maheshbhai are friends of the deceased. All of them give similar version about the incident and corroborate each other. First Informant-Ganeshbhai

Mafaji is the brother of the deceased. Although, he has not seen the incident himself, he reaches to the spot immediately and sees the appellant running from the spot. The FIR is given promptly and it contains the details of the incident. Mr. Prachchhak further submitted that as many as four injuries were caused to the deceased. Dr. Bharatbhai Dave, who has performed the postmortem, has opined that the injuries were sufficient in ordinary course of nature to cause death and were possible with the weapons allegedly used in the commission of offence. Mr. Prachchhak has submitted that the trial Court has taken into consideration all these aspects and has then recorded conviction for the offence of murder. The prosecution has also established that Notification under Section 37(1) of the Bombay Police Act was in force at the time of incident for the area in question by examining Bharatbhai Gordhanbhai and producing the copy of the Notification at Ex. 15 and therefore, the conviction under Section 135 is also properly recorded. Mr. Prachchhak submitted that the conviction is justly and appropriately recorded and appeal may, therefore, be dismissed.

5. We have gone through the records and proceedings and have examined the same from the angle suggested by

learned advocate for the appellant and learned Addl.P.P.

6.We find that the prosecution, during the course of the trial, has examined following witnesses :-

(i) PW-1 Ganeshbhai Mafaji Thakor, Exh. 8.

(ii) PW-2 Sarojben Rajubhai, Exh. 9.

(iii)PW-3 Dr. Bharatkumar Shankarlal Dave, Exh. 10,

(iv) PW-4 Mukesh Jivaji Thakor, Exh. 12,

(v) PW-5 Mahesh Dashrath Ranva, Exh. 13.

(vi)PW-6 Bharatkumar Gordhandas, Exh. 14,

(vii) PW-7 Pratapbhai Vaghubhai, Exh. 16,

(viii) PW-8 Natwarbhai Motiji Rana, Exh. 18

(ix)PW-9 Prakashkumar Ravjibhai Rana, Exh. 20.

(x) PW-10 Raijibhai Koyabhai Garasiya, Exh. 22,

(xi) PW-11 Dineshbhai Punjabhai Desai, Exh. 29,

(xii)PW-12 Manilal Shivabhai Patel, Exh. 31.

7.The prosecution has also relied on the following documentary evidence :-

(i) First Information Report of Ganeshbhai Mafaji, Exh.23

(ii) Panchnama of the place of incident, Exh. 19

(iii)Panchnama of the recovery of Muddamal Gupti, Exh.21,

(iv) Inquest Panchnama, Exh. 24.

(v) F.S.L. Report, Exh. 27,

(vi) Panchnama of cloths of deceased Girish Mafaji, Exh.25,

(vii) Medical certificate.

(viii) Panchnama of the cloths of appellant – Mahendra, Exh.30,

(ix) Postmortem report, Ex. 11.

(x) Resolution of the Police Commissioner, Exh.15

(xi) True copy of the Pg. No.117 of the Vardhi book of Gomtipur Police Station, Exh. 17,

(xii) Map of the place of incident, Exh. 28,

8. First Informant Ganeshbhai Mafaji Thakor is examined at Ex. 8. He is the brother of the deceased and he says that he had gone to his maternal aunt's place situate near the place of incident. The deceased had gone out with his friends for taking “Paan”. He suddenly heard commotion and therefore, came out. He noticed the appellant run away from the place. He also noticed that his brother was badly injured and his sister Sarojben and friends of deceased, Mukeshbhai and Maheshbhai were present there. He noticed that the appellant was bare handed while he was running away from the place. The guptis were snatched away by Sarojben. The deceased had two injuries on right side chest and one injury on

abdomen. The deceased was taken to Shardaben Hospital in Auto-rickshaw, where, he was declared dead. The witness is cross-examined, but nothing emerges from the cross-examination to raise any suspicion about what is stated by him in his examination-in-chief.

9. Sarojben Rajuji Thakor has been examined at Ex. 9. She says that she had come to her parental house on the day of the incident and around the time when the incident occurred, she was packing her baggage, when she heard shouts. Therefore, she rushed towards the place of incident. She saw the appellant inflicting gupti blows on deceased Girish. She identifies the appellant as the assailant. She says that the appellant had Guptis in both the hands. She says that she could dodge the gupti blow of the bigger gupti and she snatched away the smaller gupti. Her brother was lying; profusely bleeding. She also says that Girish was taken in a rickshaw to Shardaben Hospital, where, he was declared dead. She says that her statement was recorded by the police and both the guptis were recovered from her by the police after drawing a panchnama. She identifies those two guptis as muddamal article Nos. 2 and 3. During the cross-examination, she says that when she reached the spot, she had not seen Ganeshbhai- the

first informant. Barring this, there is no cross-examination about the incident. Most of the questions relate to topography of the place of incident.

10.Eye-witness Mukeshbhai Jivaji is examined at Ex. 12 and eye-witness Maheshbhai Dashrathji is examined at Ex. 13. The version, that is given by these two witnesses, is that on the day of the incident, both of them alongwith deceased Girish, had gone to have “paan masala” at “Lucky Paan Centre”. While, they were returning, the appellant came from the opposite direction on his bicycle at a high speed and dashed with witness Maheshbhai. He was asked as to why did he dash the cycle, though there was sufficient space on the road to move. He (appellant) started giving abuses and there was scuffle. Thereafter, the appellant went away on his bicycle and the trio started returning home. When they reached near the place of incident, the appellant came with two guptis in his hands. He came on his feet and inflicted gupti blows on Girish. In the meantime, Sarojben had arrived and there was commotion. Sarojben snatched away gupti from the appellant. Girish fell to the ground. He was bleeding. The appellant ran away towards local office and Girish was taken to hospital in an auto-rickshaw, where, he was declared

dead. These witnesses are also cross-examined. It is focused mainly on the topography of the place. Witness Mukeshbhai says that Sarojben was first to arrive at the place of the incident followed by first informant-Ganeshbhai.

11. Dr. Bharatbhai Shankarlal Dave is examined at Ex. 10. He had performed the postmortem of the body of the deceased. He says that injuries were sufficient in ordinary course of nature to cause death. He says that he had noticed four injuries on the body as described in the postmortem notes. Two of them were stab wounds in chest, which were cavity deep. The cause of death was internal haemorrhage due to the injuries sustained. Postmortem Notes Ex. 11 indicate that Pleural cavity is full of blood. The stab wounds between second and fourth I/c. space corresponds external injuries Nos.1 and 2.

12. The prosecution has examined other witnesses, who are either Police witnesses or Panch witnesses.

13. From what is emerging in evidence, as stated above, it is clear that the incident occurred in presence of witnesses Mukeshbhai Jivaji and Maheshbhai Dashrathji and Sarojben Rajuji. Witnesses Mukeshbhai and Maheshbhai were with the deceased even prior to the

incident and they have also witnessed the earlier incident. The appellant then went to his house and came back with two guptis and inflicted blows on the deceased straightway. There is no exchange of words, no encounter, no scuffle but direct assault. On hearing shouts, Sarojben Rajuji reaches to the spot and sees the incident, may be from a distance and then snatches away the two guptis from the appellant. Two guptis are produced by her before the police. One of them is found with blood stains of human blood of the group of the deceased.

13.1 Ganeshbhai Mafaji Thakor reaches the spot immediately after the incident. He also says that the appellant ran away from the place. The eye-witnesses Mukeshbhai Jivaji and Maheshbhai Dashrathji, have also stated that Sarojben reached the place of incident first, followed by Ganeshbhai Mafaji. Ganeshbhai Mafaji Thakor also gives the same version.

13.1.1 Learned advocate for the appellant was at loss to point out any reason as to why the depositions of those eye-witnesses cannot be believed or should be denied credence. Simply because Sarojben is the sister

of the deceased, Ganeshbhai Mafaji is the brother of the deceased and Maheshbhai and Mukeshbhai are the friends of the deceased, their depositions cannot be discarded. Cogent, justifiable and legally sustainable reasons are necessary to discard evidence of such relative or friend witness. All that, prudence requires is that the evidence of such witnesses should be given a close scrutiny. A reference can be had from the decision rendered by the Apex Court in case of **BANTI ALIAS GUDDU VS. STATE OF M.P.** Reported in 2004 Supreme Court Cases (Cri.) p.294, where, their Lordships have held that merely because the witness is a relative of the deceased and the other one was known to him, that per se cannot be a ground to discard their evidence and that it would be necessary to scrutinize the evidence carefully.

13.1.2 We have given these pieces of evidence a close scrutiny but we do not find any reason to doubt the version. It cannot be overlooked that the incident occurred at about 11-30 PM. The place of incident is near the house of deceased and maternal aunt of the deceased and therefore, the presence of Sarojben and Ganeshbhai is natural. The presence of Mukeshbhai and

Maheshbhai is also natural as they were friends of the deceased and they had gone together to have paan-masala. Under the circumstances, contention that the witnesses are interested witnesses, cannot be accepted. It would also be unreasonable to expect the presence of independent witnesses at such an hour of the day and prosecution case cannot be doubted only on the ground of absence of the independent witnesses.

14.It was contended that the depositions of witnesses Mukeshbhai and Maheshbhai are parrotlike and suffer from vice of being tutored witnesses. We do not find any substance in this contention. If the two witnesses have seen the incident together from close quarters, it is natural that they describe the incident in same manner or chronology. It may, to an extent, add to the veracity of their evidence. Consistent version of two eye-witnesses corroborating each other would not be weakened nor would it be rendered doubtful on ground of alleged parrotlike or tutored version, when the deposition is otherwise found truthful, reliable and trustworthy.

14.1 We have scanned the evidence of the eye-witnesses Mukeshbhai and Maheshbhai. Their versions are

consistent. They have stood the acid test of cross-examination and have remained unshaken. Whey they have seen the incident together, their evidence on that aspect is bound to be similar. It cannot be inferred only on this Count that witnesses are tutored and therefore, unreliable. We find no reasons to doubt their evidence.

15.It is thus clear that the appellant is established to have caused injuries to the deceased.

15.1 Dr. Bharat S. Dave has stated in clear terms that the injuries were sufficient in ordinary course of nature to cause death. The appellant has reached to the spot with two guptis in his hands and has inflicted multiple blows and caused multiple injuries. He has given these blows without any provocation or exchange of words. The earlier incident had come to an end and he had gone to his place. Thereafter, he came with these weapons and caused fatal injuries. Looking to the number of injuries caused, the nature of injuries, the site of injuries on the person of the deceased, it is a clear case of murder and therefore, we are of the view that the trial Court was justified in convicting the appellant for offence of murder.

16.Likewise, the Notification under Section 37 of the Bombay Police Act is produced on record at Ex. 15 through witness Bharatbhai Gordhanbhai, Ex. 14. It is clear that the Notification was in force for the area in question around the time in question and therefore, the conviction under the Bombay Police Act is also justified.

17.We have examined the aspect of quantum of punishment after hearing learned Advocate for the appellant and Ld. Addl. P.P. We find that the appellant has not made out any case for reduction of quantum of punishment nor do we find any justification of reducing the quantum of punishment.

18.We do not find any merits in the appeal. Appeal must fail and stands dismissed. The judgment and order of the trial Court is confirmed.

(A.L.DAVE, J.)

(S.R.BRAHMBHATT, J.)

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